Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-138

WARREN YEOMANS, ALBERT SCHUHOLZ, WAYNE K. ALLEN, SANDRA ALLEN, DONNA LUX, DONALD GARRETT, ANN GARRETT, MELVIN FORSYTH and ROSEMARY FORSYTH,

Petitioners,

vs.

COMMONWEALTH OF KENTUCKY, KENTUCKY DEPARTMENT OF BANKING AND SECURITIES, KENTUCKY DIVISION OF SECURITIES, STATE OF OHIO, OHIO DEPARTMENT OF COMMERCE, and OHIO DIVISION OF SECURITIES,

Respondents.

On Petition For Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

BRIEF OF RESPONDENTS THE STATE OF OHIO, THE OHIO DEPARTMENT OF COMMERCE, AND THE OHIO DIVISION OF SECURITIES IN OPPOSITION

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INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED

1. Does there exist a conflict between the decision rendered by the United States Court of Appeals for the Second Circuit in *Forman* v. *Community Services, Inc.*, 500 F.2d 1246 (1974), reversed on other grounds *sub nom. The State of New York* v. *Forman*, — U.S. —, 95 S.Ct. 2051 (1975), and the decision rendered by the United States Court of Appeals for the Sixth Circuit in *Yeomans* v. *Commonwealth of Kentucky*, 514 F.2d 993 (6th Cir. 1975), on the question of whether the Eleventh Amendment to the United States Constitution protects an unconsenting state against suit under the federal securities laws in federal court? 2

2. Has Congress authorized suits for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 against a class of defendants which literally includes the States? 2

3. Did Congress intend to require waiver of Eleventh Amendment immunity as a price of a state's engaging in concurrent regulation of securities? 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 3

CONCLUSION 10

CITATIONS

Cases: Page

Duhne v. New Jersey,
251 U.S. 311 (1920) 6

Edelman v. Jordan,
415 U.S. 651 (1974) 7, 8

Employees v. Missouri Public Health Dept.,
411 U.S. 279 (1973) 5, 6

Fitzpatrick v. Bitzer,
— F.2d —, 43 USLW 2529 (decided 6/2/75) 5

Forman v. Community Services, Inc.,
500 F.2d 1246 (2d Cir. 1974), reversed on other grounds *sub nom.* The State of New York v. Forman,
— U.S. —, 95 S.Ct. 2051 (1975) 2, 3, 4, 5, 6

Great Northern Life Insurance Co. v. Read,
322 U.S. 47 (1944) 6

Hans v. Louisiana,
134 U.S. 1 (1890) 6

Knight v. State of New York,
443 F.2d 415 (2d Cir. 1971) 5

MacKethan v. Virginia,
508 F.2d 838 (4th Cir. 1974),
cert. den. 43 USLW 3672 (6/23/75) 10

Parden v. Terminal Railway Co.,
377 U.S. 184 (1964) 4, 7, 9

Rothstein v. Wyman,
467 F.2d 226 (2d Cir. 1972) 5

Yeomans v. Commonwealth of Kentucky,
514 F.2d 993 (6th Cir. 1975) 2

Page

Constitutional Provisions:

United States Constitution
Eleventh Amendment 2, 3, 5, 6, 7, 9

Miscellaneous:

The Securities Act of 1933 .....2, 3, 6

The Securities Exchange Act of 1934 .....2, 3, 6, 9

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OPINION BELOW

The opinion below from the United States Court of Appeals for the Sixth Circuit, dated April 28, 1975, is reported at 514 F.2d 933 and appears in the Appendix to the Petition for Writ of Certiorari at page 14a. All other unreported decisions in this case from the United States District Court for the Southern District of Ohio also appear as follows: (1)

Order granting the motions of Ohio and Kentucky to dismiss the States as defendants from the action, Appendix 1a; (2) Order severing the claims against the States from the main body of litigation, Appendix 6a; and (3) Order for certification of final judgment, pursuant to Rule 54(b), F.R.Civ. P., dismissing the States from the action, Appendix 10a.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review the judgment in question.

QUESTIONS PRESENTED

1. Does there exist a conflict between the decision rendered by the United States Court of Appeals for the Second Circuit in *Forman* v. *Community Services, Inc.*, 500 F.2d 1246 (1974), reversed on other grounds *sub nom. The State of New York* v. *Forman*, — U.S. —, 95 S.Ct. 2051 (1975), and the decision rendered by the United States Court of Appeals for the Sixth Circuit in *Yeomans* v. *Commonwealth of Kentucky*, 514 F.2d 993 (6th Cir. 1975), on the question whether the Eleventh Amendment to the United States Constitution protects an unconsenting state against suit under the federal securities laws in federal court?

2. Has Congress authorized suits for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934 against a class of defendants which literally includes the States?

3. Did Congress intend to require waiver of Eleventh Amendment immuity as a price of a state's engaging in concurrent regulation of securities?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional and statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petition adequately states the procedural course taken by this case through the courts below. The facts, as summarized in the Petition, must be taken as true since the case is on appeal from the affirmance of a dismissal on jurisdictional grounds by the District Court. Petitioners allege that both Ohio and Kentucky aided and abetted certain violations of federal securities laws by their failure either to detect or prevent such violations. The District Court sustained the States' respective motions to dismiss on the ground that ". . . neither the entry by the state into an undefined field subject to federal regulation, nor its failure to administer its own laws in that field, furnish any basis for a waiver of the Eleventh Amendment or a consent to be sued." Petition at 4a.

The United States Court of Appeals for the Sixth Circuit affirmed that decision *Per Curiam* on April 28, 1975.

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE UNITED STATES COURTS OF APPEAL FOR THE SIXTH AND SECOND CIRCUITS ON THE QUESTION WHETHER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROTECTS AN UNCONSENTING STATE FROM SUIT UNDER THE SECURITIES ACT OF 1933 OR THE SECURITIES EXCHANGE ACT OF 1934 IN FEDERAL COURT.

Petitioners have exploited language in *Forman* v. *Community Services, Inc.*, 500 F.2d 1246 (1974), reversed on other grounds *sub nom. The State of New York* v. *Forman*, — U.S. —, 95 S.Ct. 2051 (1975), in order to create the arti-

ficial appearance of conflict with the recent decision of the Sixth Circuit in this case (514 F.2d 933). They assert that the evidence of "conflict" lies in the different result reached by each of these tribunals when presented with the same question: May federal courts be utilized to bring suit against a state in a private damage action for violation of the federal securities laws? Although the answer of the respective courts was not the same, the difference was grounded in the dissimilar activities undertaken by the various states and not upon any legal difference of opinion. Thus, the two decisions are logically and completely reconcilable.

In *Forman, supra,* the Second Circuit found that the State of New York had itself engaged in the sale and distribution of securities. In that regard, its activity was seen as analogous to Alabama's proprietary operation of a railroad for profit in *Parden* v. *Terminal Railway Co.,* 377 U.S. 184 (1964). The Court further determined that New York knew the sale and distribution of securities was subject to federal regulation when it authorized the offerings that were sold:

> "Thus when the State enacted the Mitchell-Lama Act in 1955 and codified it in 1961, it did so with the knowledge that transactions involving subscriptions of stock solicited through the mails were already within the ambit of federal antifraud regulations and statutes." *Forman, supra,* at 1256.

Therefore, the Court concluded, New York had impliedly waived its constitutional immunity from suit by voluntarily entering a field of federal regulation as a mere seller of securities:

> ". . . Congress conditioned the right to be involved in the sale and distribution of securities upon amenability to suit as provided by those regulatory laws." 514 F. 2d, at 1256.

In *Forman* it was neither unreasonable nor illogical that New York could be viewed as a "person" and could impliedly submit itself to the jurisdiction of federal courts while engaging in a proprietary activity. However, New York's activity was far different from the governmental activity which characterized several recent decisions of this Court as well as the decision below in this case.[1] *Employees* v. *Missouri Department of Public Health and Welfare,* 411 U.S. 279 (1973); *Edelman* v. *Jordan,* 415 U.S. 651 (1974).[2]

In this case below, the Sixth Circuit did not directly deal with the question of whether the term "person" includes a state for purposes of securities antifraud provisions. Rather, the focus of its examination was whether the States' activity in question, concurrent regulation of securities with the federal government, could constitute an implied or constructive waiver of its Eleventh Amendment immunity. The Court was only concerned with its jurisdiction over a state acting in its regulatory capacity and not involved in the distribution of securities. It held that the States were not forced to abandon their existing scheme of regulation simply because Congress, pursuant to legislation under the Commerce Clause, also entered the field.

Petitioners have clearly fabricated a conflict between circuits. They have completely put aside the proper context of these decisions in an attempt to expend the *Parden* theory of implied waiver to include the co-regulation of securities by the states and the federal government. The circuit decisions are easily reconcilable. The Second Circuit held that New

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[1] In fact, the Second Circuit itself has long repudiated the theory of implied Eleventh Amendment waiver in the case of a governmental function which was distinguished from the proprietary type of activity found in *Parden.* See *Fitzpatrick* v. *Bitzer,* —— F.2d ——, 43 USLW 2529 (June 2, 1975); *Rothstein* v. *Wyman,* 467 F.2d 226 (1972); and *Knight* v. *State of New York,* 443 F.2d 415 (1971).

[2] In its disposition of the *Forman* case, the Supreme Court was not forced to decide the issue of a state's amenability to suit, however the Court clearly viewed New York's role as a voluntary participant in the sale of securities and not as a governmental body engaged in the regulation of securities. *Forman,* 95 S.Ct. 2051 at 2057, note 10.

York, *qua* underwriter or issuer, could be liable for fraud in the interstate sale of its securities. The Sixth Circuit, deliberating after *Forman* had been decided, examined the State's exposure, *qua* regulator, under those same statutes. It determined that Congress had not expressly authorized a suit against a regulating state nor had the State consented to any type of waiver of its constitutional immunity from such suits.

Thus, there is no conflict between circuits that would serve as a basis for allowing the Petition.

II

CONGRESS HAS NOT AUTHORIZED SUITS FOR VIOLATIONS OF THE SECURITIES ACT OF 1933 OR THE SECURITIES EXCHANGE ACT OF 1934 AGAINST A CLASS OF DEFENDANTS WHICH LITERALLY INCLUDES THE STATES.

In terms, the Eleventh Amendment to the United States Constitution bars the Petitioners' suit and all other seeking money damages against a state in federal court. The Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Amendment has been held to bar suits by a citizen against his own state of residence as well as other states. *Hans* v. *Louisiana,* 134 U.S. 1 (1890); *Duhne* v. *New Jersey,* 251 U.S. 311 (1920); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47 (1944); *Employees* v. *Missouri, supra.*

Clearly, a state may expressly waive the protection of the Eleventh Amendment. Further, Congress, in regulating interstate commerce, may require states to waive that immunity as the price of participating in proprietary activities regulated

by the federal government. *Parden* v. *Terminal Railway Co., supra.* This Court has recently laid down exact guidelines to be followed in making the determination whether Congress has required such a waiver.

The first question that must be answered in that regard is whether Congress has authorized suit of the sort sought to be brought against a class of defendants which includes the States.

Justice Rehnquist stated this requirement in *Edelman* v. *Jordan,* 415 U.S. 651, 672 as follows:

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes the States is wholly absent."

When the instant case is measured against that standard, it is found wanting. Congress has never authorized suit under either the Securities Act or the Securities Exchange Act against states acting concurrently with the federal government in the *regulation* of securities.

Thus, Petitioners' theory of Eleventh Amendment waiver by Ohio, and impliedly by all states which regulate securities, fails to meet even the first test imposed by this Court for finding such a waiver. The Petition should be denied on this ground alone.

III

CONGRESS NEVER INTENDED TO REQUIRE WAIVER OF ELEVENTH AMENDMENT IMMUNITY AS THE PRICE OF A STATE'S ENGAGING IN CONCURRENT REGULATION OF SECURITIES.

Even if the Petitioners' case satisfied the "threshold" test of *Edelman,* which it does not, it would still fail to establish Eleventh Amendment waiver. For, in addition, this Court

requires a showing that Congress intended to abrogate the immunity and that the State expressly consented to the abrogation by some definite action:

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, Parden,* and *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275 (1975)] to turn on whether Congress intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman, supra,* at 672.

The showing must be a strong one, since "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . ." *Edelman,* at 672. The Court adhered to its previous standard of explicit abrogation of the immunity:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L.Ed. 742, 29 S.Ct. 458 (1909)." 415 U.S., at 673.

The Petitioners' theory here is that when Ohio and Kentucky left their exclusive regulatory sphere and engaged in the regulation of securities concurrently with the federal government they waived their immunity. There is, however, no evidence that Congress intended to abrogate the States' constitutional immunity by the mere fact of concurrent regulation.

The Petitioners' only argument in support of their theory is that where the conduct of state officials is particularly reprehensible, Congress surely must have intended to effect a waiver of immunity — as though the quality of regulatory activity alone decided the question. In fact, it completely begs the question. It assumes that securities laws create

rights of action against the states which are available when official conduct is errant. As previously noted, however, these laws do no such thing.

The argument will simply not bear the weight Petitioners put upon it. They persist in it because they have no other argument to show that Congress intended to abrogate the immunity for states which have chosen to regulate securities concurrently with the federal government. In fact, all the evidence is to the contrary. For example, in adopting the Securities Exchange Act of 1934, Congress carefully preserved the jurisdiction of the states to regulate securities. Section 28 of the Act provides:

> "Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) or any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." 15 U.S.C. § 78bb(a).

It would be strange for Congress to explicitly preserve the states' regulatory prerogatives and, at the same time silently intend, if any state exercised that jurisdiction, to require a forfeiture of its Eleventh Amendment immunity.

Indeed, the very argument is absurd. If states had to risk federal court damage suits for huge amounts of money by regulating securities they would all surely abandon this field. That result is clearly not what Congress intended when it so explicitly protected their jurisdiction.

The regulation of securities by a state is a purely governmental function, unlike the situation presented in *Parden* v. *Terminal Railway Co., supra,* upon which Petitioners so heavily rely. When states engage in such activity, they are entitled to the protection of the Eleventh Amendment.

CONCLUSION

Respondents submit that the Petition for Certiorari should be denied. In addition to the fact that no conflict between circuits presently exists on any question presented here for review by Petitioners, this Court has only recently denied a Petition for Certiorari in a case involving the same issues: *MacKethan* v. *Commonwealth of Virginia,* 508 F.2d 838 (4th Cir. 1974) cert den. 43 USLW 3672 (June 23, 1975). Furthermore, federal courts lack the jurisdiction to hear this suit because neither Ohio nor Kentucky has consented to be sued nor expressly or impliedly waived their Eleventh Amendment immunity from suit in federal court.

Respectfully submitted,

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